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FILED
DISTRICT COURT OF GUAM

FEB - 6 2006

MARY L.M. MORAN
CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE TERRITORY OF GUAM

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MAX S. MENDIOLA,

Defendant.

CRIMINAL CASE NO. 04-00056

**GOVERNMENT'S OPPOSITION
TO ANY FURTHER GUIDELINES
DEPARTURES**

On September 22, 2005, the United States moved this Honorable Court for a one level downward departure from the guidelines sentencing level pursuant to USSG § 3E1.1(b) because the defendant timely notified the government of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently. If the court grants this motion, defendant's total offense level will be 29, with a sentencing range of 87-108 months. The government is recommending a sentence of 87 months incarceration.

Defendant has filed a request that the court depart from the applicable Guidelines offense level because, as set forth at ¶ 31, page 8 of the Presentence Report, a portion of the 47.47 grams which he attempted to possess with intent to distribute, was L-methamphetamine hydrochloride. Defendant correctly notes that the Sentencing Commission eliminated the distinction between the L- and D- isomers of methamphetamine hydrochloride in 1995. See USSG App. C (Amendment 517) (Nov.1995). Defendant does not dispute that he attempted to possess 47.47 grams net

1 weight of "ice," methamphetamine hydrochloride which was 80% or more pure. USSG
2 2D1.1(c), Note (C). Nor does he dispute that the appropriate Guidelines level for this quantity of
3 ice is Level 30.

4 He argues that Note (C) is ambiguous and leaves open the possibility that a mixture
5 containing L-methamphetamine hydrochloride is not considered "ice." To the contrary, the
6 Guidelines specifically eliminated the distinction between types of methamphetamine; the
7 definition of "ice" is not based upon type, but rather purity. Thus, a substance could be 100% L-
8 methamphetamine, yet it would by definition constitute "ice." The Commentary to 2D1.1, note
9 5, clearly instructs that "[a]ny reference to a particular controlled substance in these guidelines
10 includes all salts, isomers, all salts of isomers, and, except as otherwise provided, any analogue
11 of that controlled substance."

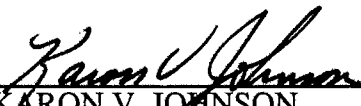
12 Defendant argues that the court could make a departure based upon the higher percentage
13 of L-Methamphetamine in this case, citing United States v. Mikaelian, 168 F.3d 380 (9th Cir.
14 1999). There, the defendant urged a downward departure based on Koon v. United States, 518
15 U.S. 81 (1996), urging that the low purity of the heroin he was dealing, only 4%, took him
16 outside the "heartland" of the applicable Guidelines for such offenses. The sentencing court
17 declined to make such a departure, and the Ninth Circuit affirmed. It held that the purity of the
18 heroin could be a reason for departure, because it was not specifically forbidden by the
19 Guidelines, and arguably constituted a "mitigating circumstance of a kind, or to a degree, not
20 adequately taken into consideration by the Sentencing Commission in formulating the
21 guidelines," *id.* at 109. It rejected the defendant's argument, however, because he had failed to
22 present evidence that a 4% purity was unusually low.

23 Such reasoning cannot apply in this instance. The Guidelines penalties for heroin, and
24 many other drugs as well, do not depend on the particular purity of the drug: any amount results
25 in a fixed base offense level. Arguably, therefore, a lesser purity might be grounds for a Koons
26 departure. The Sentencing Commission, however, has specifically provided that the purity of
27 methamphetamine does matter: it is "ice" if it is 80% or higher, with harsher penalties as a result.

1 The Commission has also determined that only the purity, not the particular isomer, is the
2 controlling factor. In short, the kind of methamphetamine cannot constitute a mitigating
3 circumstance which has not adequately been taken into consideration by the Sentencing
4 Guidelines Commission in formulating the guidelines, and therefore cannot be considered a
5 factor in sentencing.

6 RESPECTFULLY SUBMITTED this 6th day of February, 2006.

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10 By: 
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